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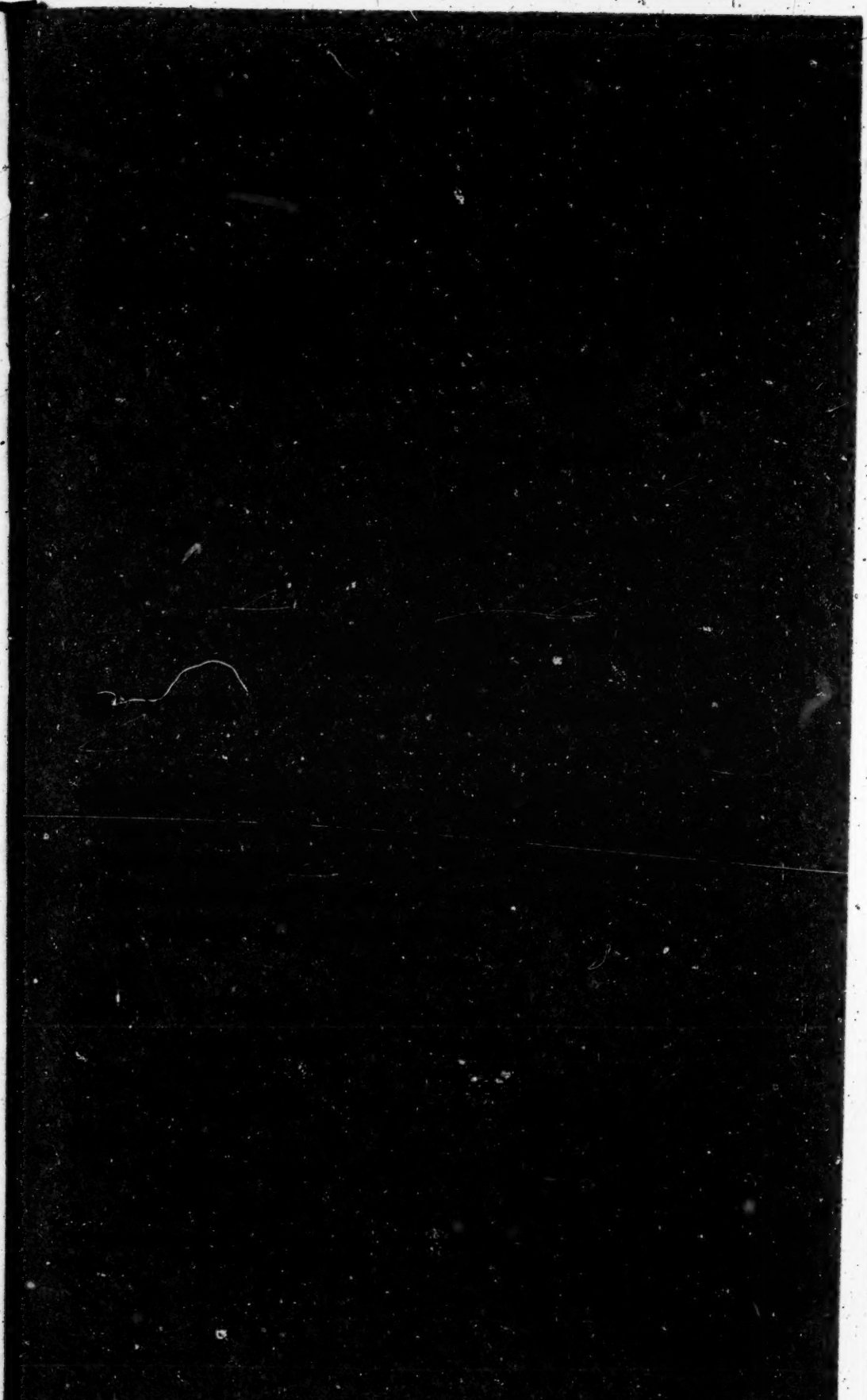

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In The

SUPREME COURT OF THE UNITED STATES

No. 6 Original, October Term, 1945.

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

AND

THE STATE OF COLORADO, IMPLEADED DEFENDANT.

THE UNITED STATES OF AMERICA, INTERVENOR.

OBJECTIONS OF STATE OF NEBRASKA TO JOINT PROPOSAL FOR DECREE FILED BY STATE OF WYOMING, DEFENDANT, STATE OF COLORADO, IMPLEADED DEFENDANT, AND UNITED STATES OF AMERICA, INTERVENOR.

WALTER R. JOHNSON,
Attorney General of Nebraska,
JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,
PAUL F. GOOD,
Special Counsel,
For Complainant.

I.

INTRODUCTORY.

As requested, pages 14 to 15, in the proposed form of decree, proposed by Nebraska, we hereby present our objections to the form of decree as proposed jointly by the other parties to this suit. Nearly half of the document filed as the form of decree jointly proposed consists of criticisms of the Nebraska proposal and of argument purporting to explain why the joint proposal is superior. We believe that the court will agree that fairness requires that Nebraska be permitted to present its reasons in support of its form of decree and to point out wherein the joint proposal departs from the opinion. Therefore, even though we have not received express permission, we present the following as our objections and criticisms of the joint proposal.

II.

OBJECTIONS AND CRITICISM OF JOINT PROPOSAL.

A.

Nebraska Paragraph I (B)
Joint Paragraph I (B)

1. The figure of "17,060" appearing in the second line of the paragraph as proposed by the State of Nebraska is a typographical error, and the joint proposal properly corrects it to conform to the opinion of the court page 24, and the Master's Report, page 177, so that it will read "17,000."

2. The joint proposal inserts in the fore part of this paragraph after the word "water" the phrase "for irriga-

tion puposes." This qualification does not appear either in the opinion, page 24, or the Master's Report, page 177, where this phase of the controversy is discussed. Complainant feels that the omission was deliberate and that both the Master's Report and the opinion means what it says in limiting the storage for all purposes. Our reasons are as follows:

(a) While the controversy primarily pertains to the use of water for irrigation purposes, uses and disposition of water upstream interfere with the availability of water for irrigation in Nebraska just as much where the uses are for one purpose as another. Nebraska sought protection of its irrigation rights. When Colorado stores water for any purpose, this storage is to that extent an interference with the irrigation rights of Nebraska water users.

(b) It is contended that if this phrase is omitted, there is an inconsistency with Nebraska Paragraph X - Joint Paragraph XI. We feel that this complaint is hypercritical. Nebraska Paragraph X makes a blanket exception from the decree for all purposes, of water for ordinary and usual domestic, municipal and stock watering purposes. This exception does not need to be repeated in each paragraph of the decree which controls the actions of the upper states.

B.

Nebraska Paragraph I (C)
Joint Paragraph I (C)

Complainant contends that the language included in Nebraska's Paragraph I (c) and in the last seven lines

of such paragraph constitutes a clarifying provision which makes unmistakable the manner of computing the "average of six thousand acre-feet computed over a period of ten years" (Opinion, p. 25).

C.

Nebraska Paragraph II (A)
Joint Paragraph II (A)

The joint proposal insists on adding to the language contained in the opinion, page 26, Master's Report, page 177, the qualification "in Wyoming" after the word "land" which does not appear either in the opinion or in the Master's Report. In connection with the insertion of this language, Nebraska does not object if it is so used as to control diversion of water in Wyoming which is all that Wyoming can control. Therefore, Nebraska is willing to have it inserted after the words "diversion of water" in the first two lines of this paragraph. Wyoming could, however, join with another state in a trans-mountain diversion to some other state for the irrigation of land in that other state thus creating the same damage to Nebraska as if the land watered were in Wyoming. Nebraska does not agree to the joint proposal, since it would permit Wyoming to divert more water for use on land in another state. It is probably wiser to follow the exact language of the opinion and the Master's Report, since the parties cannot agree upon any change.

D.

Nebraska Paragraph II (B)
Joint Paragraph II (B)

The comments under A. apply here.

E.

Nebraska Paragraph III
Joint Paragraph III

Nebraska's proposal follows the exact language contained in the opinion, page 33, Master's Report, page 178. We can see no advantage in the substitution of the word "use" for the word "administration."

We believe that the court and the Master deliberately confined the restriction to Nebraska canals for the following reasons:

(a) The paragraph constitutes an injunction against the State of Wyoming, its officers, agents and employees. There is no need to enjoin them against action which might harm Wyoming's own appropriators since Wyoming laws control those officers, etc. and since Wyoming has both the legal and physical power to take any action that may be necessary for the benefit of Wyoming appropriators, subject to the restrictions contained in the decree.

(b) An injunction against Wyoming for the benefit of Wyoming appropriators is beyond the scope and jurisdiction of this court in an interstate suit. Such an injunction would constitute an unwarranted interference with the powers of a state.

F.

Nebraska Paragraph IV
Joint Paragraph IV

The provisos following the table appear neither in the opinion, pages 27 to 28, nor in the Master's Report, pages

177 to 178. The possibility of provisos similar to (1) and (2) is discussed, pages 28 to 30, in the opinion, and the court specifically says (p. 30):

> "We do not believe, however, that any revision of this part of the proposed decree need be made. We cannot assume that Nebraska will undertake to circumvent the decree. Moreover, the proposed revision offers difficulties. As Nebraska points out, when a junior Nebraska canal having storage rights is closed to natural flow due to operation of Nebraska priorities, it should be allowed to make up the deficiency in its supply in relation to its requirements by asking for storage water under such contracts as it may have with the United States. The United States does not repudiate those contracts. We conclude that it would unduly complicate the decree to recast its provisions so as to take them into account."

We cannot see that Subdivision (3) of the proposed provisos is needed since the decree must provide for the elimination of storage water from the control of the decree, and in different language, both the Nebraska proposal and the joint proposal attempt to carry this into effect (Nebraska Paragraph VI - Joint Paragraph VII). Thus, when water once acquires the characteristic of storage water, it can obviously be re-stored as well as used.

G.

Nebraska Paragraph V
Joint Paragraph V

The differences between the Nebraska proposal and the joint proposal are two:

(a) The Nebraska proposal follows the opinion, pages 37 to 38, Master's Report, page 179, in granting an injunction against Wyoming alone. The joint proposal suggests an injuction against Nebraska as well. It is obvious that the lower state does not have the physical power to control diversions above the state line, and, therefore, no injunction is necessary to prevent Nebraska from doing what it has no power to do. Nebraska gets only such water as Wyoming allows to pass the state line, and when that water has come into Nebraska, it obviously cannot be made available for Wyoming appropriators. Thus, Wyoming has no interest in what disposition is made of the water after it has passed the state line. We can see no good reason for departing from the opinion and the Master's Report.

(b) Following the formula taken from United States' Exhibit 204 A., both proposals include 'provisions with reference to the time interval for the passage of water from point to point, which is an element in determining the effect of transmission losses at any particular time. Nebraska is willing to have a provision made that this time interval shall be determined by agreement by Nebraska, Wyoming and the United States, and this is in harmony with the opinion, marginal note 19, page 38. The joint proposal is that in the absence of such agreement, the manager of the government reservoirs shall have the sole and uncontrolled power to declare what that time interval is. Admittedly, this power is not given either by the Master's Report or by the opinion. Obviously, the United States is an interested party in this question, since it vitally

affects storage water which the United States is to have available for the fulfillment of its contracts. The United States proposes in this joint proposal that it have the sole power to decide a vital question in which it is so deeply interested. Obviously, the representative of the United States in a conference convened in an attempt to arrive at an agreement can disagree to anything proposed by the other parties, thus withdrawing the decision to his own exclusive judgment. He can thus force upon the parties a wholly arbitrary and unreasonable decision against which they have no remedy. It is contrary to all principles of equity and fairness that the interested party should be the judge in his own case.

Nebraska most earnestly objects to this change which the other parties propose in the decision of the court and in the Master's Report.

H.

Joint Paragraph VI

The Master's Report does not recommend and the opinion does not indicate that any such provision as Joint Paragraph VI should be included in the decree. We refer the court to the discussion found above under Paragraph F. hereof, Nebraska Paragraph IV - Joint Paragraph IV. As above pointed out, the opinion, page 30, specifically rejects a proposal that the Master's proposed decree should be revised to cover this item. Joint Paragraph VI takes no account of the storage contracts with the United States for storage water from Pathfinder

to be diverted below the Tri-State Dam. The court in its opinion, page 30, says they should be protected, but that it would unduly complicate the decree to recast its provisions so as to take such contracts into account.

I.

Nebraska Paragraph VI
Joint Paragraph VII

The joint proposal asks the court to insert in the decree one of the basic grounds upon which the court reached its conclusion, namely, that apportionment of storage water is unnecessary to prevent a recurrence of the practice of making diversions in excess of requirements. This is from page 39 of the opinion. However, this is only one of the places wherein the court discusses the question of whether storage water should be included in the apportionment. The question is also discussed on pages 24, 29, 31, 38 and 53. If the theory of the joint proposal is correct, then all of the basic reasons for eliminating storage water should be given. The reason given on page 39 is not the only one. For example, on page 38, it is stated that the decree must recognize the obligations of the contracts for disposition of storage water. Likewise, on page 39, it is stated that if an apportionment of storage water is made, it would disrupt the established system of water administration; and that if storage water is not segregated, storage water contractors will in time of shortage, be deprived of the use of a part of the storage supply for which they pay.

We can see no proper reason for inclusion in the decree of all of the basic reasons for a particular provision,

since if this were done, the decree would be merely a repetition of the opinion.

J.

Nebraska Paragraph IX
Joint Paragraph X

The proviso eliminating the water uses excepted in the next succeeding paragraph, from the requirement as to measurements and records, we believe is unnecessary and is not included in the opinion, pages 52 to 53.

K.

Nebraska Paragraph X
Joint Paragraph XI

The opinion, page 52, Master's Report, page 180, excepts from the restrictions of the decree water for ordinary and usual domestic and municipal purposes and consumption. Now, as an afterthought, it is proposed that recreational uses should also be excepted. This term is of such broad import that we believe it should not be permitted. Under it, either Colorado or Wyoming might construct an artificial lake for boating purposes containing many thousands of acre-feet of water. While recreation has its place, we do not believe that recreational uses are in the same class as domestic, municipal and stock watering purposes, and we believe that they should not take precedence over irrigation. The exception as to recreational purposes is not found in either the opinion or the Master's Report.

L.

Nebraska Paragraph XII

Nebraska's proposal (which has no counterpart in the joint proposal) is based upon the opinion, page 48. Since it has to do with the operation of the Northport Canal in relation to the drains intercepted by Tri-State Canal, and the effect of the case of *United States* v. *Tilley*, (C. C. A. 8th, 124 Fed. [2d] 850), we believe it properly finds its place in the decree.

M.

Nebraska Paragraph XIII (A)
Joint Paragraph XIII (A)

As we construe the provisions of page 25 of the opinion, in connection with pages 42 to 44, the court does not intend to affect the relative rights of the water users within any of the affected states except as may be specifically provided in the decree (Opinion, pp. 42-44). We believe that the joint proposal does not properly take into account the full effect of the opinion.

N.

Nebraska Paragraph XIV (G)

This is based upon the opinion, page 53, and merely constitutes a reservation of jurisdiction. The opinion states "all questions concerning the apportionment of such water will await the event." We believe that the court intended to include this among the questions which might be decided in the future if and when a question arises.

O.

Nebraska Paragraph XIV (H)

This is based upon the exact language of the opinion, page 30:

> "If, as the United States fears, the decree is administered so as to divert water from above Tri-State to the use of those diverting below Tri-State, application for appropriate relief may be made at the foot of the decree."

Nebraska's proposal preserves the jurisdiction of the court in accordance with this language.

III.

CONCLUSION.

In almost every respect wherein the joint proposal differs from the Nebraska proposal, the joint proposal attempts to make substantial changes in the opinion and to vary its natural effect. Counsel for the other three parties seem to conceive that in proposals for a decree they may do what would ordinarily be the function of a motion for rehearing or a compact among the parties. We particularly point to the provision in Joint Proposal Paragraph V attempting to give unrestrained power to the representative of the United States to determine one of the essential elements in the segregation of storage water from natural flow. We likewise point to the open disregard of the court's opinion contained in Joint Paragraph IV and Joint Paragraph VI. These are in direct conflict to the court's language, page 30, in which the court says "we do not believe, however, that any revision of this part of the proposed decree need be made."

We further point to the attempt in Joint Paragraph XI to except recreational uses of water from the provisions of the decree.

Nebraska conceives that the proper function of these proposals now made by the parties should be an interpretation and application of the opinion and not its alteration.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,
For Complainant.

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SUPREME COURT OF THE UNITED STATES.

No. 6, Original.—October Term, 1945.

The State of Nebraska, Complainant,
vs.
The State of Wyoming, Defendant, and the State of Colorado, Impleaded Defendant, The United States of America, Intervenor.
} In Equity.

[October 8, 1945.]

This cause having been heretofore submitted on the report of the Special Master and the exceptions of the parties thereto, and the Court being now fully advised in the premises:

It is ordered, adjudged and decreed that:

I. The State of Colorado, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River and its tributaries for the irrigation of more than a total of 135,000 acres of land in Jackson County, Colorado, during any one irrigation season;

(b) From storing or permitting the storage of more than a total amount of 17,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries in Jackson County, Colorado, between October 1 of any year and September 30 of the following year;

(c) From exporting out of the basin of the North Platte River and its tributaries in Jackson County, Colorado, to any other stream basin or basins more than 60,000 acre feet of water in any period of ten consecutive years reckoned in continuing progressive series beginning with October 1, 1945.

II. Exclusive of the Kendrick Project and Seminoe Reservoir the State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined

(a) From diverting or permitting the diversion of water from the North Platte River above the Guernsey Reservoir and from the tributaries entering the North Platte River above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season.

(b) From storing or permitting the storage of more than a total amount of 18,000 acre feet of water for irrigation purposes from the North Platte River and its tributaries above

the Pathfinder Reservoir between October 1 of any year and September 30 of the following year.

III. The State of Wyoming, its officers, attorneys, agents and employees, be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe and Alcova Reservoirs otherwise than in accordance with the relative storage rights, as among themselves, of such reservoirs, which are hereby defined and fixed as follows:

First, Pathfinder Reservoir;
Second, Guernsey Reservoir;
Third, Seminoe Reservoir; and
Fourth, Alcova Reservoir;

Provided, however, that water may be impounded in or released from Seminoe Reservoir, contrary to the foregoing rule of priority operation for use in the generation of electric power when and only when such storage or release will not materially interfere with the administration of water for irrigation purposes according to the priority decreed for the French Canal and the State Line Canals.

IV. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from storing or permitting the storage of water in Pathfinder, Guernsey, Seminoe or Alcova Reservoirs, and from the diversion of natural flow water through the Casper Canal for the Kendrick Project between and including May 1 and September 30 of each year otherwise than in accordance with the rule of priority in relation to the appropriations of the Nebraska lands supplied by the French Canal and by the State Line Canals, which said Nebraska appropriations are hereby adjudged to be senior to said four reservoirs and said Casper Canal, and which said Nebraska appropriations are hereby identified and defined, and their diversion limitations in second feet and seasonal limitations in acre feet fixed as follows:

Lands	Canal	Limitation in Sec. Feet	Seasonal Limitation in Acre Ft.
Tract of 1025 acres	French	15	2,227
Mitchell Irrigation District	Mitchell	195	35,000
Gering Irrigation District	Gering	193	36,000
Farmers Irrigation District	Tri-State	748	183,050
Ramshorn Irrigation District	Ramshorn	14	3,000

V. The natural flow in the Guernsey Dam to Tri-State Dam section between and including May 1 and September 30 of each year, including the contribution of Spring Creek, be and the same hereby is apportioned between Wyoming and Nebraska on the basis of twenty-five per cent to Wyoming aand seventy-five per cent to Nebraska, with the right granted Nebraska to designate from time to time the portion of its share which shall be delivered into the Interstate, Fort Laramie, French and Mitchell Canals for use on the Nebraska lands served by these canals. The State of Nebraska, its officers, attorneys, agents and employees, and the State of Wyoming, its officers, attorneys, agents and employees, are hereby enjoined and restrained from diversion or use contrary to this apportionment, provided that in the apportionment of water in this section the flow for each day, until ascertainable, shall be assumed to be the same as that of the preceding day, as shown by the measurements and computations for that day, and provided further, that unless and until Nebraska, Wyoming and the United States agree upon a modification thereof, or upon another formula, reservoir evaporation and transportation losses in the segregation of natural flow and storage shall be computed in accordance with the following formula taken from United States' Exhibit 204A:

Reservoir Evaporation Losses.

Seminoe, Pathfinder and Alcova Reservoirs.

Evaporation will be computed daily based upon evaporation from Weather Bureau Standard 4 foot diameter Class "A" pan located at Pathfinder reservoir. Daily evaporation will be multiplied by area of water surface of reservoir in acres and by co-efficient of 70% to reduce pan record to open water surface.

Guernsey Reservoir.

Compute same as above except use pan evaporation at Whalen Dam.

River Carriage Losses.

River carriage losses will be computed upon basis of area of river water surface as determined by aerial surveys made in 1939 and previous years and upon average monthly evaporation at Pathfinder reservoir for the period 1921 to 1939, inclusive, using a co-efficient of 70% to reduce pan records to open water surface.

Daily evaporation losses in second-feet for various sections of the river are shown in the following table:

TABLE

River Section	Area Acres	Daily Loss—Second Feet May	June	July	Aug.	Sept.
Alcova to Wendover....	8360	53	76	87	76	56
Guernsey Res. to Whalen	560	4	5	6	5	4
Whalen to State Line ...	2430	16	22	25	22	16

Above table is based upon mean evaporation at Pathfinder as follows: May .561 ft.; June .767 ft.; July .910 ft.; Aug. .799 ft.; Sept. .568 ft. Co-efficient of 70% to reduce pan record to open water surface.

Above table does not contain computed loss for section of river from Pathfinder dam to head of Alcova reservoir (area 170 acres) because this area is less than submerged area of original river bed in Alcova reservoir and is, therefore, considered as off-set.

Likewise the area between Seminoe dam and head of Pathfinder reservoir is less than area of original river bed through Pathfinder reservoir — considered as off-set. Evaporation losses will be divided between natural flow and storage water flowing in any section of river channel upon a proportional basis. This proportion will ordinarily be determined at the upper end of the section except under conditions of intervening accruals or diversions that materially change the ratio of storage to natural flow at the lower end of the section. In such event the average proportion for the section will be determined by using the mean ratio for the two ends of the section.

In the determination of transportation losses for the various sections of the stream, such time intervals for the passage of water from point to point shall be used as may be agreed upon by Nebraska, Wyoming and the United States, or in the absence of such agreement, as may be decided upon from day to day by the manager of the government reservoirs, with such adjustments to be made by said manager from time to time as may be necessary to make as accurate a segregation as is possible.

VI. This decree is intended to and does deal with and apportion only the natural flow of the North Platte River. Storage water shall not be affected by this decree and the owners of rights therein shall be permitted to distribute the same in accordance with any lawful contracts which they may have entered into or may in the future enter into, without interference because of this decree.

VII. Such additional gauging stations and measuring devices at or near the Wyoming-Nebraska state line, if any, as may be necessary for making any apportionment herein decreed, shall be constructed and maintained at the joint and equal expense of Wyoming and Nebraska to the extent that the costs thereof are not paid by others.

VIII. The State of Wyoming, its officers, attorneys, agents and employees be and they are hereby severally enjoined from diverting or permitting the diversion of water from the North Platte River or its tributaries at or above Alcova Reservoir in lieu of or in exchange for return flow water from the Kendrick Project reaching the North Platte River below Alcova Reservoir.

IX. The State of Wyoming and the State of Colorado be and they hereby are each required to prepare and maintain complete and accurate records of the total area of land irrigated and the storage and exportation of the water of the North Platte River and its tributaries within those portions of their respective jurisdictions covered by the provisions of paragraphs I and II hereof, and such records shall be available for inspection at all reasonable times; provided, however, that such records shall not be required in reference to the water uses permitted by paragraph X hereof.

X. This decree shall not affect or restrict the use or diversion of water from the North Platte River and its tributaries in Colorado or Wyoming for ordinary and usual domestic, municipal and stock watering purposes and consumption.

XI. For the purposes of this decree:

(a) "Season" or "seasonal" refers to the irrigation season, May 1 to Septeml r 30, inclusive;

(b) The term "storage water" as applied to releases from reservoirs owned and operated by the United States is defined as any water which is released from reservoirs for use on lands under canals having storage contracts in addition to the water which is discharged through those reservoirs to meet natural flow uses permitted by this decree;

(c) "Natural flow water" shall be taken as referring to all water in the stream except storage water;

(d) Return flows of Kendrick Project shall be deemed to be "natural flow water" when they have reached the North Platte

River, and subject to the same diversion and use as any other natural flow in the stream.

XII. This decree shall not affect:

(a) The relative rights of water users within any one of the States who are parties to this suit except as may be otherwise specifically provided herein;

(b) Such claims as the United States has to storage water under Wyoming law; nor will the decree in any way interfere with the ownership and operation by the United States of the various federal storage and power plants, works and facilities.

(c) The use or disposition of any additional supply or supplies of water which in the future may be imported into the basin of the North Platte River from the water shed of an entirely separate stream, and which presently do not enter said basin, or the return flow from any such supply or supplies.

(d) The apportionment heretofore made by this Court between the States of Wyoming and Colorado of the waters of the Laramie River, a tributary of the North Platte River;

(e) The apportionment made by the compact between the States of Nebraska and Colorado, apportioning the water of the South Platte River.

XIII. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy. Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to, the following:

(a) The question of the applicability and effect of the Act of August 9, 1937, 50 Stat. 564, 595-596, upon the rights of Colorado and its water users when and if water hereafter is available for storage and use in connection with the Kendrick Project in Wyoming.

(b) The question of the effect upon the rights of upstream areas of the construction or threatened construction in downstream areas of any projects not now existing or recognized in this decree;

(c) The question of the effect of the construction or threatened construction of storage capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir;

(d) The question of the right to divert at or above the headgate of the Casper Canal any water in lieu of, or in exchange for, any water developed by artificial drainage to the river of sump areas on the Kendrick Project;

(e) Any question relating to the joint operation of Pathfinder, Guernsey, Seminoe and Alcova Reservoirs whenever changed conditions make such joint operation possible.

(f) Any change in conditions making modification of the decree or the granting of further relief necessary or appropriate.

XIV. The costs in this cause shall be apportioned and paid as follows: the State of Colorado one-fifth; the State of Wyoming two-fifths; and the State of Nebraska two-fifths. Payment of the fees and expenses of the Special Master has been provided by a previous order of this Court.

XV. The clerk of this Court shall transmit to the chief magistrates of the States of Colorado, Wyoming, and Nebraska, copies of this decree duly authenticated under the seal of this Court.